

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

**TO THE HONORABLE FREDERICK J. MARTONE:**

Plaintiff was further warned that his failure to acquire a waiver of service from Defendants or to complete service of process on Defendants within 120 days of the date the complaint was filed, that is, by February 4, 2009, would result in the dismissal of the complaint pursuant to Rule 4(m), Federal Rules of Civil Procedure, and Rule 16.2(b)(2)(B), of the United States District Court for the District of Arizona Local Rules of

1 Civil Procedure. The civil docket in this matter indicates that  
2 Plaintiff has failed to return service packets to the Court, or  
3 acquire a waiver of service from Defendants or to complete  
4 service of process on Defendants.

5 On February 6, 2009, the Court allowed Plaintiff until  
6 February 27, 2009, to show cause why this case should not be  
7 dismissed for Plaintiff's failure to comply with the Court's  
8 order of October 27, 2008, and Plaintiff's failure to effect  
9 service of process on Defendants as required by the Court's  
10 order of October 27, 2008, and Rule 4, Federal Rules of Civil  
11 Procedure. However, the Order to Show Cause sent to Plaintiff  
12 at his last known address was returned as undeliverable.

13 Rule 3.4, Local Rules of Civil Procedure for the  
14 United States District Court for the District of Arizona  
15 requires prisoner-litigants to comply with instructions attached  
16 to the Court-approved complaint form for use in section 1983  
17 actions. Those instructions provide: "You must immediately  
18 notify the clerk ... in writing of any change in your mailing  
19 address. Failure to notify the court of any change in your  
20 mailing address may result in the dismissal of your case."

21 Plaintiff has a general duty to prosecute this case.  
22 Fidelity Phila. Trust Co. v. Pioche Mines Consol., Inc., 587  
23 F.2d 27, 29 (9th Cir. 1978). In this regard, it is the duty of  
24 a plaintiff who has filed a *pro se* action to keep the Court  
25 apprised of his current address and to comply with the Court's  
26 orders in a timely fashion. This Court does not have an  
27 affirmative obligation to locate Plaintiff. "A party, not the  
28 district court, bears the burden of keeping the court apprised

1 of any changes in his mailing address." Carey v. King, 856 F.2d  
2 1439, 1441 (9th Cir. 1988). Plaintiff's failure to keep the  
3 Court informed of his new address constitutes failure to  
4 prosecute.

5 Rule 41(b) of the Federal Rules of Civil Procedure  
6 provides that "[f]or failure of the plaintiff to prosecute or to  
7 comply with these rules or any order of court, a defendant may  
8 move for dismissal of an action." In Link v. Wabash Railroad  
9 Co., 370 U.S. 626, 629-31 (1962), the Supreme Court recognized  
10 that a federal district court has the inherent power to dismiss  
11 a case *sua sponte* for failure to prosecute, even though the  
12 language of Rule 41(b) of the Federal Rules of Civil Procedure  
13 appears to require a motion from a party. Moreover, in  
14 appropriate circumstances, the Court may dismiss a complaint for  
15 failure to prosecute even without notice or hearing. Id. at  
16 633.

17 In determining whether Plaintiff's failure to  
18 prosecute warrants dismissal of the case, the Court must weigh  
19 the following five factors: "(1) the public's interest in  
20 expeditious resolution of litigation; (2) the court's need to  
21 manage its docket; (3) the risk of prejudice to the defendants;  
22 (4) the public policy favoring disposition of cases on their  
23 merits; and (5) the availability of less drastic sanctions."  
24 Carey, 856 F.2d at 1440 (quoting Henderson v. Duncan, 779 F.2d  
25 1421, 1423 (9th Cir. 1986)). "The first two of these factors  
26 favor the imposition of sanctions in most cases, while the  
27 fourth factor cuts against a default or dismissal sanction.  
28 Thus the key factors are prejudice and availability of lesser


1 sanctions." Wanderer v. Johnson, 910 F.2d 652, 656 (9th Cir.  
2 1990).

3 Here, the first, second, and third factors favor  
4 dismissal of this case. Plaintiff's failure to keep the Court  
5 informed of his address prevents the case from proceeding in the  
6 foreseeable future. The fourth factor, as always, weighs  
7 against dismissal. The fifth factor requires the Court to  
8 consider whether a less drastic alternative is available.  
9 Without Plaintiff's current address, however, certain  
10 alternatives are bound to be futile. Here, as in Carey, "[a]n  
11 order to show cause why dismissal is not warranted or an order  
12 imposing sanctions would only find itself taking a round trip  
13 tour through the United States mail." 856 F.2d at 1441.

14 The Court finds that only one less drastic sanction  
15 is realistically available. Rule 41(b) provides that a  
16 dismissal for failure to prosecute operates as an adjudication  
17 upon the merits "[u]nless the court in its order for dismissal  
18 otherwise specifies." In the instant case, the Court concludes  
19 that a dismissal with prejudice would be unnecessarily harsh.

20 **IT IS THEREFORE RECOMMENDED** that, pursuant to Rule  
21 41(b) and Rule 4(m), Federal Rules of Civil Procedure, this  
22 action be dismissed without prejudice.

23 DATED this 2<sup>nd</sup> day of March, 2009.

24  
25  
26   
27 Mark E. Asper  
28 United States Magistrate Judge